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Supreme Court of the United States

OCTOBER TERM, 1961

No. 528

WILLIE BRUNER,
Petitioner,

versus

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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UNITED STATES SUPREME COURT.

OCTOBER TERM, 1961.

No.

WILLIE BRUNER,
Petitioner,

versus

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

Petitioner, Willie Bruner, by his attorney, S. Gunter Toney, presents this, his petition for Writ of Certiorari:

REPORT OF OPINIONS BELOW.

The District Court entered judgment and imposed sentence but did not deliver an opinion.

The opinion of the United States Court of Appeals for the Fifth Circuit has not yet been published in any official or unofficial report. That opinion is included in the certified transcript of the record filed herewith (R. 84).

STATEMENT OF THE GROUNDS ON WHICH JURISDICTION OF THIS COURT IS INVOKED.

Petitioner seeks to have reviewed a Judgment of the United States Court of Appeals, Fifth Circuit, dated the 1st. day of September 1961, affirming the Judgment and Sentence of the United States District Court for the Northern District of Florida, Marianna Division, on appeal, a certified copy being attached hereto.

The Petitioner filed a Petition for Rehearing with the United States Court of Appeals, Fifth Circuit on the 22nd. day of September, 1961, and the same was denied by order of said Court on the 2nd. day of October, 1961 (R. 91-98).

The statutory provision conferring on this Honorable Court jurisdiction to review the judgment of the United States Court of Appeals, Fifth Circuit is 62 Statutes 928 (June 25, 1948, Chapter 646).

CONSTITUTIONAL PROVISIONS WHICH THE CASE INVOLVES.

AMENDMENT IV.

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be

violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

QUESTIONS PRESENTED FOR REVIEW.

The points relied on by the Petitioner for granting of the Writ of Certiorari, are as follows:

POINT ONE: The Trial Court committed reversible error in denying Petitioner's Motion to Suppress evidence of non-tax paid whiskey seized from the Petitioner and in finding him guilty as charged.

POINT TWO: The Trial Court committed reversible error in failing to permit disclosure of the informer who allegedly gave the arresting officer reliable information that Petitioner or someone would haul whiskey from the Bates area.

STATEMENT OF THE CASE.

On the 8th. day of September, 1960 the Petitioner was indicted on charges of violation of 26 U.S.C. 5205 (a) (2), 5604 (a) (1) (possession of non-tax paid distilled spirits) and 26 U.S.C. 5601 (a) (12) (transportation on non-tax paid distilled spirits) (R. 1). Petitioner filed his Motion to Suppress the evidence on the grounds that the evidence was obtained by search and seizure that was unlawful and in violation of the constitution of the United States (R. 3-5), waived trial

by jury (R. 6), the Trial Court denied said motion and entered its finding of guilty (R. 8) and imposed sentence for a term of eighteen (18) months (R. 74-75).

B. H. Jones, a Florida State Beverage Agent, testified that on June 17, 1960 at 6:30 P.M. or 7:00 P.M. he received confidential information from an informant that a 1950 Ford would pick up some whiskey in the Bates Settlement before midnight the same date and that the Petitioner would possibly be driving but it could be any other white male or any other person driving (R. 34). (Witness on cross-examination testified that he had erred, that he meant a 1957 Ford) (R. 37). This information was given to Jones at Marianna, Florida (R. 27), a distance of eighteen (18) to twenty (20) miles from the Bates Settlement (R. 24). Jones testified that the above information was not sufficient to obtain a search warrant and he did not attempt to secure one (R. 27).

Upon direct examination of the witness, Jones, the trial Court refused to permit him to reveal the name of his confidential informer (R. 35).

June Sims, an investigator with the United States Treasury Department, Alcohol Tax and Tobacco Tax Division, W. A. Dykes, a Florida State Beverage Agent, and Jones left Marianna, Florida, shortly after 6:00 P.M. on June 17, 1960, and at approximately 9:30 P.M. on the same date met the defendant near the Bates Settlement; the Petitioner's automobile was first observed traveling in the opposite direction of the officer's

vehicle upon an unpaved, graded road, at a speed of approximately fifteen (15) to twenty (20) miles per hour (R. 14). The officers recognized the vehicle as being the same type and model they were searching for (R. 14); that the vehicle that was first observed left them at a very high rate of speed (R. 15), but the Petitioner testified that he was not aware that the officers were in the vicinity until he noticed them in his rear view mirror and that his speed at that time was from fifteen (15) to twenty (20) miles per hour and that when he arrived on the highway his speed was approximately fifty (50) miles per hour (R. 46). The officer testified that they immediately turned around and commenced chasing the Ford at high speeds and they succeeded in overtaking him at a distance of from five (5) to six (6) miles from the starting point (R. 14-18). Officer Sims sounded his siren and the car left the highway (R. 21). They met the Petitioner at the rear of his automobile, identified themselves, flashed a flashlight into the front floorboard thereof and observed what appeared to be a five (5) gallon jug encased in a sugar sack (R. 21 and 31-32).

The Petitioner did not consent to the search. No search warrant was secured and presented. No arrest warrant was secured and presented (R. 32). No arrest was made for violation of traffic regulations (R. 34). No arrest was made until subsequent to the search of the defendant's vehicle, the whiskey uncovered, tasted and determination made that the five (5) gallon jug had no tax stamps attached thereto (R. 33-34).

The United States District Court for the Northern District of Florida had original jurisdiction of the Petitioner and the offenses charged based upon an indictment presented by the Grand Jury charging violation of 26 USC 5205 (a) (2), 5604 (a) (1) and 26 USC 5601 (a) (12) (possession and transportation of non-tax paid whiskey) within said district (R. 1-2).

ARGUMENT.

POINT ONE: The Trial Court committed reversible error in denying Petitioner's Motion to Suppress evidence of non-tax paid whiskey seized from the Petitioner and in finding him guilty as charged.

The Trial Court's denial of the Petitioner's Motion to Suppress evidence of the five gallon jug of non-tax paid whiskey was error in view of the evidence presented on the question of probable cause to justify the search and seizure. No arrest or search warrant was secured and presented; no valid arrest was made to serve as the basis for a lawful search; no consent to search was given by the Petitioner; approximately two hours prior to the search of Petitioner's automobile, a state officer allegedly received confidential information that a 1950 Ford would pick up some whiskey in the Bates Settlement before midnight and that Petitioner would possibly be driving but it could be any other white male or any other person driving (R. 34). (Witness on cross-examination testified that he had erred, that he meant a 1957 Ford) (R. 37). No attempt was made to obtain a search warrant although the

Bates area was only eighteen to twenty miles from the point where the information was obtained. The officer testified that said information was not sufficient to obtain a search warrant (R. 27).

The officer met a 1957 Ford automobile near the Bates area traveling in an opposite direction on an unpaved, graded road at a speed of approximately fifteen (15) to twenty (20) miles per hour; they recognized the vehicle as being the same type and model they were searching for (R. 14); turned their vehicle, commenced following said Ford which then took off at a high rate of speed. The officers reached a speed of over one hundred (100) miles per hour before overtaking the Ford. As they closed on the Ford their siren was blown and the Ford went onto the shoulder and stopped. State Officer Jones went to the Ford, recognized the driver as the Petitioner, threw his flashlight in the car and discovered a five gallon jug ~~in a sugar sack, searched, tasted~~, and a federal officer placed the Petitioner under arrest (R. 15-22).

It is respectfully submitted that until the officers commanded the Petitioner to stop on the highway at night time, flashed their light, observed a five gallon jug in a sugar sack, and searched for evidence of tax stamps they had no facts upon which to base a reasonable belief that Petitioner's vehicle was carrying non-tax paid whiskey. Clearly at the time the officers first observed the 1957 Ford traveling at fifteen (15) to twenty (20) miles per hour they possessed no facts upon which to base a reasonable belief that it was being used to carry non-tax paid whiskey.

The unverified, so-called, confidential information, which was not established as being reliable, together with the officer's observation of the Ford traveling at a low rate of speed near the Bates area are not such facts to constitute probable cause.

We would call the Court's attention to the cases of *Carroll v. United States,* 267 U.S. 132, 455 S. Ct. 280 and *Brinegar v. United States,* 338 U.S. 160, 69 S. Ct. 1302 where the officers had prior dealings with the defendants, recognized them and where certain admissions were made (*Carroll* case) and where the officers had observed the defendants loading liquor on a previous occasion their automobile appeared to be heavily loaded and the defendants made certain admissions, (*Brinegar* case, *supra*).

POINT TWO: The Trial Court committed reversible error in failing to permit disclosure of the informer who allegedly gave the arresting officer reliable information that Petitioner or someone would haul whiskey from the Bates area.

The Government, the Trial Court and the Court of Appeals relied upon and utilized the confidential communication of the informer as supplying probable cause to justify the questioned search and seizure. Note the last paragraph of Page 3 of the Court's Opinion (R. 86).

It is respectfully submitted that the record fails to reveal sufficient evidence apart from the confidential

communication to establish probable cause to justify the questioned search and seizure.

We next call the Court's attention to the case of *Roviaro v. United States*, 353 U.S. 53, 61; 77 S. Ct. 623 628 where this Court stated:

> "Most of the federal cases involving this limitation on the scope of the informer's privilege have arisen where the legality of a search without a warrant is in issue and the communications of an informer are claimed to establish probable cause. In these cases the *Government has been required to disclose the identity of the informant unless there was sufficient evidence apart from his confidential communication.*" (Emphasis supplied).

The case of *Scher v. United States*, 305 U.S. 251, 59 S. Ct. 174 is cited in the *Roviaro* case, *supra*, as authority for this proposition. It is conceded that the *Roviaro* case, *supra*, may be distinguished from the case at bar but it is respectfully submitted that the *Scher* case, *supra*, is in point.

In the *Scher* case, *supra*, the officers personally observed activities and heard admissions which constituted sufficient facts apart from the confidential communication to establish probable cause whereas in the case at bar the record is barren of such facts. The United States Court of Appeals, Fifth Circuit made no finding that sufficient facts existed in the instant case apart from the confidential communication to supply probable cause.

Therefore, it is respectfully submitted that the United States Court of Appeals, Fifth Circuit has decided a federal question in a way in conflict with the decision of this Court in the case of *Scher v. United States*, 305 U.S. 251, 59 S. Ct. 174.

PRAYER.

Wherefore, Petitioner prays that he may be granted a Writ of Certiorari and that this Honorable Court consider the certified Transcript of Record filed herewith and on hearing, the Judgment of the United States Court of Appeals, Fifth Circuit, affirming the Judgment and Sentence of the District Court of Florida, be quashed, and Petitioner further prays for such other and further general relie as may be meet and proper.

Respectfully submitted,

S. GUNTER TONEY,
212 East Jefferson St.,
Tallahassee, Florida,
Attorney for Petitioner.

CERTIFICATE.

I hereby certify that I served a copy of the foregoing petition for Writ of Certiorari, by mail, to the Honorable Clinton N. Ashmore, United States Attorney, Tallahassee, Florida, and a copy to Solicitor General, Department of Justice, Washington 25, D. C. on this ... day of October, 1961.

S. GUNTER TONEY.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 18796

WILLIE BRUNER,
Appellant,

versus

UNITED STATES OF AMERICA,
Appellee.

Appeal from the United States District Court for the Northern District of Florida.

(September 1, 1961)

Before TUTTLE, Chief Judge, and CAMERON and JONES, Circuit Judges.

JONES, Circuit Judge: The appellant seeks the reversal of his conviction and sentence for the possession of moonshine whiskey in violation of 26 U.S.C.A. § 5205 (a) (2), 5604 (a) (1), and the removal of moonshine whiskey in violation of 26 U.S.C.A. § 5601 (a) (12). He waived trial by jury. Before trial the appellant moved to suppress and exclude as evidence a five gallon jug containing the moonshine whiskey. The motion to suppress was denied. The appellant was adjudged guilty, his motion for a new trial was overruled, he was sentenced, and has appealed.

It was stipulated that the evidence on the motion to suppress might be considered in the trial of the cause.

The evidence showed that a Florida State Beverage Agent, B. H. Jones, was told in Marianna, Florida, at about six-thirty in the evening on June 17, 1960, by a confidential informer that a 1957 Ford with a 1960 Florida tag, driven by Willie Bruner or by "any other white male or any other person," would pick up some whiskey in the Bates Settlement before midnight of that day. The court sustained the Government's objection to the question asked of Jones by appellant's counsel as to the name of the confidential informer. The Bates Settlement was identified as an area at the boundary line between Calhoun and Jackson Counties in Florida. The residence in the area of several families by the name of Bates gave it its name. Over objection, testimony was received that the Bates Settlement had the reputation of being a place where whiskey was made and hauled out.

Agent Jones and Federal Treasury Investigator Sims went by automobile that evening to the Bates Settlement. With them was another Florida Beverage Agent named W. A. Dykes, who went along for the ride and the experience. About 9 o'clock, on a dirt road, near the Bates area, the car containing the officers met a 1957 Ford. They turned around to follow it. The 1957 Ford took off at a high rate of speed with the officers following and at times, said one of the officers, "sweeping out some sand ditches." After traveling the dirt road a few miles the Ford reached and turned onto a paved highway with the officers in pursuit. They reached a speed of over 100 miles an hour before overtaking the Ford. As they came up to it, their siren

was blown and the Ford went onto the shoulder and stopped. Florida Agent Jones went to the Ford. Bruner, the appellant, was the only occupant. Jones recognized the driver as Bruner. Jones threw his flashlight in the car and discovered a five gallon jug of untaxed moonshine whiskey. At this juncture the federal officer came up to the 1957 Ford. Bruner got out and the federal officer placed him under arrest. Bruner's motion to suppress was overruled, he was adjudged guilty and given an eighteen months' sentence.

Two questions are raised on appeal, that the motion to suppress should have been granted and that the court should have required the disclosure of the identity of the confidential informer.

Our question as to the validity of the search and seizure is one of probable cause, that is, a belief "reasonably arising out of circumstances known to the seizing officer that an automobile or other vehicle contains that which by law is subject to seizure and destruction." *Carroll v. United States*, 327 U. S. 132, 149 S.-Ct. 280, 69 L. Ed. 543. See *Brinegan v. United States*, 338 U.S. 160, 69 S. Ct. 1302, 93 L. Ed. 1879, *Chapman v. United States*, 5th Cir. 1961, 289 F. 2d 539; *Patenotte v. United States*, 5th Cir. 1959, 266 F. 2d 647; *Flores v. United States*, 5th Cir. 1956, 234 F 2d 604. Here the officers were informed that a car of a particular make, model, year and color, would be in or coming from a location having a reputation for moonshine activity, driven by Bruner or some white male, and containing untaxed whiskey. This information supplied probable cause for following the Bruner car and upon it being

stopped and Bruner being recognized, justified the search. The full discussion in *Patenotte v. United States, supra*, obviates any need for a further review of the authorities in this opinion. Each case is to be decided upon its own facts. Upon the facts of this case the search and seizure were justified.

On the question as to whether the Government should have been required to disclose the identity of the informer, it seems now to be settled that such disclosure cannot be required unless it is relevant and helpful to the defense of the accused or is essential to a fair determination of a cause. *Roviaro v. United States*, 353 U. S. 53, 77 S. Ct. 623, 1 L. Ed. 2d 639; *Scher v. United States*, 305 U. S. 251, 59 S. Ct. 174, 83 L. Ed. 151; *Miller v. United States*, 5th Cir. 1959, 273 F. 2d 279, cert. den. 362 U. S. 928, 80 S. Ct. 256, 4 L. Ed. 2d 747. Nothing in the record before us shows any need for requiring the disclosure to be made.

We find no error. The judgment of the district court is

AFFIRMED.

A true copy.
Test:

EDWARD W. WADSWORTH,
Clerk, U. S. Court of Appeals,
Fifth Circuit.
By CLARA R. JAMES,
(Seal) Deputy.

New Orleans, Louisiana.

Oct. 17, 1961.

JUDGMENT.

Extract from the Minutes of September 1, 1961.

No. 18796.

WILLIE BRUNER,

versus

UNITED STATES OF AMERICA.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

No. 18796.

WILLIE BRUNER,

Appellant,

versus

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court for the Northern District of Florida.

(October 2, 1961.)

ON PETITION FOR REHEARING.

Before TUTTLE, Chief Judge, and CAMERON and JONES, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing in the above entitled and numbered cause be, and it is hereby DENIED.

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UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT.

No. 18796.

WILLIE BRUNER,

Appellant,

versus

UNITED STATES OF AMERICA,

Appellee.

ON CONSIDERATION OF THE APPLICATION of the appellant in the above numbered and entitled cause for a stay of the mandate of this Court therein, to enable appellant to apply for and to obtain a writ of certiorari from the Supreme Court of the United States, IT IS ORDERED that the issue of the mandate of this Court in said cause be and the same is stayed for a period of thirty days from October 2, 1961; the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within thirty days from October 2, 1961, there shall be filed with the Clerk of this Court the certificate of the Clerk of the Supreme Court that certiorari petition and record have been filed. It is further ordered that the Clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of thirty days from October 2, 1961, unless the above-mentioned certificate shall be filed with the Clerk of this Court within that time.

WARREN L. JONES.
United States Circuit Judge.

Dated: October 17, 1961.